IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1047

GLOBAL INDUSTRIES, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on September 20, 1976.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit is not reported; a copy is set forth in Appendix "A" hereto. The decision of the National Labor Relations Board is not yet reported; a copy is set forth in Appendix "B" hereto.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eighth Circuit was entered on September 20, 1976. On December 8, 1976, Mr. Justice Blackmun granted an extension of time to and including January 31, 1977, within which to file this Petition. This Court's jurisdiction is invoked under Title 28, United States Code §1254 (1).

QUESTIONS PRESENTED

1. May a N.L.R.B. order predicated upon unfair labor practices of a subsidiary corporation be directed at the parent corporation?

2. Do the activities of the employer in this case meet the jurisdictional standards of the N.L.R.B.?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant sections of the National Relations Labor Act are set forth in Appendix "C" hereto.

STATEMENT

This case originated with the lodging by Respondent National Labor Relations Board of unfair labor practice charges against, *inter alia*, Petitioner Global Industries, Inc. Charges arose out of a labor dispute between a theatre projectionist union and the American Theatre Corporation which operates a theatre in Omaha, Nebraska. At the time of the unfair labor practices charged, American Theatre Corporation was a subsidiary of Petitioner Global Industries, Inc.

The unfair labor practice charges were founded upon the action of American Theatre Corporation in reducing projectionist wages and in discharging two projectionists at its Omaha, Nebraska theatre. The National Relations Labor Board found that the discharges constituted violations of Sections 8 (a) (1) and 8 (a) (3) of the National Relations Labor Act. The Board further found that the reduction of projectionist wages and a refusal of American Theatre Corporation to deal with the motion picture projectionist union constituted a violation of Sections 8 (a) (1) and 8 (a) (5) of the National Labor Relations Act. While there was no contention that Petitioner Global Industries, Inc. engaged in the actual commission of unfair labor practices, it was named in the proceeding because of its corporate relationship with American Theatre Corporation. That relationship was established in the record by stipulation. At or about the time of the unfair labor practices charged, Global Industries owned all of the stock of American Theatre Corporation. At the same time, Mr. Mel Friedman of Atlanta, Georgia, was President of both American Theatre Corporation and Global Industries, Inc. Based primarily upon this corporate relationship and common officership,

the N.L.R.B. found that Global Industries, Inc., along with American Theatre Corporation and another subsidiary, should be grouped together as a single employer within the meaning of the National Labor Relations Act.

Upon finding that American Theatre Corporation had engaged in unfair practices, the N.L.R.B. directed its order against American Theatre Corporation, Global Industries, Inc. and another subsidiary of Global Industries. On appeal, the United States Court of Appeals for the Eighth Circuit granted an enforcement of the N.L.R.B. order without opinion.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON THE ISSUE OF WHETHER AN N.L.R.B. ORDER PREDICATED UPON UNFAIR LABOR PRACTICES OF A SUBSIDIARY MAY BE DIRECTED AT THE PARENT CORPORATION.

As previously stated, the unfair labor practices charged were all predicated upon activities of American Theatre Corporation in reducing wages for projectionists, in discharging two projectionists, and in refusal to recognize or deal with the motion picture projectionist union. For purposes of the labor board proceedings, however, American Theatre Corporation was grouped together with its parent Global Industries, Inc.

The N.L.R.B., upon a finding that unfair labor practices had been committed, directed its remedial order at both the subsidiary and the parent corporations. In opposing an order of enforcement before the Eighth Circuit Court of Appeals, Global Industries, Inc. raised the issue of its responsibility for alleged unfair labor practices committed by its subsidiary. The Court of Appeals affirmed the N.L.R.B. order in its entirety without opinion.

In a similar set of circumstances, the United States Court of Appeals for the Second Circuit reached a contrary conclusion *N.L.R.B. v. Timken Silent Automatic Co.*, 114 F.2d 449, 2d Cir., 1940.

The *Timken* case involved unfair labor practices charged against Timken Silent Automatic Co., a wholly-owned subsidiary of the Detroit-Timken Company. As in the present case, the unfair labor practice charges were predicated upon actions of the subsidiary, Timken Silent Automatic Co. The N.L.R.B., however, found unfair labor practices and directed an order against both the parent and subsidiary corporations. When compliance was not forthcoming, the N.L.R.B. petitioned the Second Circuit Court of Appeals for an order of enforcement against both companies. The parent corporation filed a motion to dismiss the petition for enforcement as to it, on the ground that the unfair labor practices, if any, were committed only by the subsidiary.

The Second Circuit Court of Appeals granted the parent corporation's motion to dismiss. In so doing, it was noted:

> "The motion by the Timken-Detroit Axle Company rests on wholly different grounds. Although the

original respondent was its wholly-owned subsidiary there is no showing here made which gives sufficient ground for disregarding the separate corporate existence of the two. No control by the parent may be said to have wronged or defrauded anyone with whom these proceedings are concerned and without proof of that sort of dominance the parent stockholder is not to be treated as one with the subsidiary corporation . . . .

"As the Detroit-Timken Axle Company is to be treated as a corporation apart from the original respondent, the motion to dismiss as to it must be granted for the reason, at least, that the only employees involved in the proceedings and the order sought to be enforced are those of the original respondent and not those of the Timken-Detroit Axle Company. *National Labor Relations Board v. National Casket Co.*, 2d Cir., 107 F.2d 992; *Phelps-Dodge Corporation v. National Labor Relations Board*, 113 F.2d, 202 2d Cir., decided July 11, 1940." 114 F.2d, at 450-451.

In the case below, the Board makes much of the fact that Global Industries owned all of the stock of American Theatre Corporation. But, as the *Timken* decision demonstrates, the fact that a company is wholly owned is not a sufficient predicate for holding the parent and subsidiary to be a single employer within the meaning of the Act. The N.L.R.B. also relied a great deal on the common officership of Mr. Mel Friedman who was at the time of the alleged unfair labor practices, president of both the subsidiary American Theatre Corporation and the parent Global Industries, Inc. It was thus noted that some American Theatre Corporation paychecks were signed by Mr. Friedman. It was further noted that Richard Berry, while

manager of the Omaha theatre, would discuss problems with and receive instructions from Mr. Friedman.

All of the above, however, is understandable and reasonable in light of the fact that Mr. Friedman was the President of the subsidiary American Theatre Corporation. But this is insufficient to support an order against the parent corporation whom Mr. Friedman also served as an officer. This has been recognized by the National Labor Relations Board in other cases which hold joint officership, even in combination with the wholly-owned subsidiary corporate relationship, insufficient to justify a finding that the companies constituted one integrated employer within the meaning of the Act.

The point was made in the case of *Jamestown Metal Equipment Co. Inc., et al.*, 17 N.L.R.B. 813 (1939). *Jamestown* involved unfair labor practices by Blackstone Manufacturing Co., Inc. the wholly-owned subsidiary of Jamestown. Despite the fact that Jamestown owned all the stock of the Blackstone Company and that the same individual served as president of both corporations, the Board dismissed the Complaint as to Jamestown, noting:

> "While the record discloses that the Jamestown company owns the stock of the Blackstone company, and that Lenna is the president of both corporations, it does not show that the Jamestown company directs and controls the operations of the Blackstone company or that it determines the labor policies of the latter. Upon the record, therefore, we are of the opinion that the Jamestown company is not shown to be the employer of the employees at the Blackstone plant within the meaning of the Act, and, as such, responsible for and chargeable

with unfair labor practices engaged in by the Blackstone company."

The same point on common officership was made more recently in *International Radio, Station KOFY*, 1960 CCH NLRB §9153. In that case the Board found that a wholly-owned subsidiary and its parent corporation did not constitute a single employer within the meaning of the National Labor Relations Act even though the parent and the subsidiary had a common president and a common secretary.

The grouping of parent and subsidiary in this case also relies upon the fact that Global Industries, Inc. owns stock in various other corporations engaged in the same business as that of American Theatre Corporation. There is Board precedent, however, as to the insufficiency of such facts to establish a single integrated employer within the meaning of the Act.

The point was well made in *Toledo Service Parking Company*, 96 N.L.R.B. 263 (1951). As the Board there said:

> "We are not unmindful of the record facts showing that the controlling stockholders of the employer are also controlling stockholders of various other corporations, engaged in business operations similar to that of the employer in many different states, and that there are certain individuals who are common to the directorate of all such corporations. We do not believe, however, that such facts establish an integration of these various corporations of such a character that we should regard them, for jurisdictional purposes, as one integrated operation." *Id.*, at 264-265.

Additionally, the *Toledo* case involved one General Manager employed by all of the corporations. Even this was found insufficient for a grouping of various corporations together as a single employer.

The factors of common stock ownership, common corporate officers, and the existence of several retail businesses operated as subsidiary corporations, all came together in *Chesnutt's Stores, Inc.*, 100 N.L.R.B. 490 (1952). That case involved three different retail grocery companies. One individual served as the president of all three corporations; another individual served as the vice president of all three corporations; yet a third individual served as the secretary/treasurer of all three corporations. In addition, the president owned 52 percent of the stock of one corporation, 72 percent of the stock of another corporation, and 25 percent of the stock of the third. Despite all this, the Board refused to consider the three companies as a single employer within the meaning of the Act:

> "From the foregoing it is clear that the employer, considered as a separate and independent enterprise, is engaged in a retail business essentially local in nature over which the Board would not normally assert jurisdiction, as the additional evidence in the record is insufficient to warrant the conclusion that the employer, in fact, functions as an integrated part of a larger interstate enterprise of several companies, all of which constitute a single employer, we find that it would not effectuate the policies of the Act to assert jurisdiction in this case." *Id.*, at 490-491.

In summary, the Eighth Circuit Court of Appeals, in refusing Petitioner's request to dismiss the application for enforcement as to it, has ruled contrary to the Second Circuit Court of Appeals on the issue of parent corporation responsibility for unfair labor practices of a subsidiary. This is a conflict only this Court can resolve.

ARGUMENT

II.

THE ACTIVITIES OF THE EMPLOYER IN THIS CASE FAIL TO MEET THE JURISDICTIONAL STANDARDS OF THE N.L.R.B. AND THE BOARD THUS IMPROPERLY ASSERTED JURISDICTION BELOW.

The activities which formed the basis for these unfair labor practice proceedings were those of American Theatre Corporation doing business as the Pussycat Theatre in Omaha, Nebraska. It is conceded that, when the activities of the parent, Petitioner Global Industries, Inc., are grouped with those of American Theatre, the jurisdictional standards of the N.L.R.B. are satisfied. On the other hand, the Board has conceded that its jurisdictional standards are not met by the activities of the subsidiary alone:

> "Jurisdiction in this case depends on whether or not the entities named, Global Industries, American Theatre and Downtown Books, constitute a single employer within the meaning of the Act. For if Global Industries is not to be included, the Board's standards for asserting jurisdiction have not been met." (App. B, A. 5).

The jurisdictional question is thus whether the parent may be grouped with its subsidiary in applying the Board's jurisdictional standards.

While Global Industries and American Theatre are affiliated, in the absence of a formulation and administration of a common labor policy, affiliated corporations cannot be held to constitute a single employer within the meaning of the National Labor Relations Act. This point was made most clearly by the Board in *Consolidated Gas Company of Savannah*, 107 N.L.R.B. 148 (1953), a case with facts very similar to those in this proceeding with respect to the issue of jurisdiction. The Board there held:

> "Although the employers together with three other corporations are controlled by the same holding company, all the corporations operate independently and not as a part of a single integrated enterprise with *common operational and labor relations policies.* We find, therefore, that they are not a single employer within the meaning of the Act. Accordingly, we shall not consider the business of the three corporations not involved in this proceeding in determining whether to assert jurisdiction. As the business of the employers involved in this proceeding do not meet the Board's minimum standards for asserting jurisdiction, we shall dismiss the petition." *Id.*, at 149-150.

Here, as was found by the N.L.R.B., Richard Berry was "a general manager of the Pussycat Theatre facility for absentee owners." (App. B, A. 9). He was an employee *only* of American Theatre Corporation. There is no contention and no finding that he worked for any of the

other Respondents. As the general manager of American Theatre, he formulated specific labor policies. He was responsible for hiring and firing employees, for setting wage rates and for the setting of other employment incidentals.

The only employment-related function performed by anyone other than Mr. Berry was the payroll computation performed by an accounting service in Atlanta, Georgia. But, even here, the operation of this clerical payroll function depended solely on information supplied by Mr. Berry. Mr. Berry informed the accounting service of the rates of pay he had established for each employee and he further informed the service of the amount of work performed by each employee. From that point the task was a purely mechanical one and can in no way be said to involve the formulation of labor policy.

The only generalized direction he took "from Atlanta" was from Mel Friedman, an officer of American Theatre Corporation. As discussed above, this lends no support to the contention that the parent and subsidiary are a single employer within the meaning of the Act since Mr. Friedman was merely acting as an officer of the subsidiary.

It can be conceded that all of an employer's operations must be considered in determining whether the Board's jurisdiction standards are met. But the very issue here is the identity of the employer. If that employer is American Theatre Corporation, then only its activities are to be considered in determining whether the jurisdictional standards are met. It is hardly disputed that the employees in this case were employed by American Theatre Corporation to work as projectionists in the Pussycat

Theatre. Global Industries is involved only because of its status as the shareholder or, as the Board found, "an investor," at the time of the alleged unfair labor practices, of American Theatre Corporation. To constitute an employer on the facts charged in this proceeding, Global Industries must be integrated with American Theatre Corporation, the resultant company being considered as a single employer within the meaning of the Act.

In finding such an integration, the N.L.R.B. relies upon the fact that American Theatre Corporation is a wholly-owned subsidiary, the fact that the same individual served as the president of both corporations, and the fact that the parent corporation has investments in several other subsidiary corporations operating similar businesses in many states. But, as the above precedent demonstrates, said commonalities are insufficient. As in all of the cases above cited, the activities of American Theatre Corporation should therefore be considered alone in determining if the Board's jurisdictional standards are met. If so considered, even the N.L.R.B. concedes that said standards are not met.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

ROBERT EUGENE SMITH,

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NO. 75–1969

National Labor Relations Board,
Petitioner,

v.

American Theatre Corporation d/b/a Pussycat Theatre; Downtown Books, Inc.; and Global Industries, Inc.,
Respondents.

On application for Enforcement of an Order of the National Labor Relations Board.

Submitted: September 15, 1976
Filed: September 20, 1976

Before BRIGHT and WEBSTER, Circuit Judges, and TALBOT SMITH, Senior District Judge.*

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* Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

ORDER OF ENFORCEMENT

The National Labor Relations Board petitions for enforcement of its order remedying unfair labor practices alleged to have occurred at the Pussycat Theatre in Omaha, Nebraska. The theatre is operated by Respondent American Theatre, which was at the time of the violations charged a subsidiary of Respondent, Global Industries. Respondent Downtown Books was a related corporation.

The Board found that the three respondent corporations were sufficiently integrated under the governing tests to be treated as a single employer for purposes of asserting its jurisdiction. It further found that the respondents, by discharging two union projectionists and replacing them with non-union projectionists at lower wages, and by expressly declaring that they would no longer deal with the projectionists' union, violated Sections 8 (a) (1), 8 (a) (3), and 8 (a) (5) of the National Labor Relations Act, as amended, 29 U.S.C. §158 (a) (1), (3), and (5).

Upon a careful consideration of the record and briefs of the the parties, we have concluded that the order of the Board is supported by substantial evidence on the record as a whole, that no error of law appears, and that an opinion would be without precedential value. The order of the Board is hereby ENFORCED without opinion. *See* Rule 14 of the Rules of this Court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

(Not to be printed or published.)

APPENDIX B

[Dated May 13, 1975]

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

AMERICAN THEATRE CORPORATION
d/b/a PUSSYCAT THEATRE; DOWNTOWN BOOKS, INC.; and GLOBAL INDUSTRIES, INC.[1]

and

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, LOCAL No. 343, AFL-CIO

Case No. 17-CA-6199

DECISION

Statement of the Case

BERNARD NESS, Administrative Law Judge: Based upon a charge filed on August 30, 1974 by International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local

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[1] The caption conforms to the General Counsel's motion, granted at the hearing.

Union 343, AFL-CIO, herein called the Union, the complaint herein was issued on December 19, 1974. The complaint, as amended at the hearing, alleges that American Theatre Corporation d/b/a Pussycat Theatre, Downtown Books, Inc., and Global Industries, Inc., hereinafter referred to individually as American Theatre, Downtown Books and Global Industries, respectively, and collectively as the Respondent, constitute a single employer within the meaning of the Act. The complaint further alleges that the Respondent committed unfair labor practices in violation of Section 8 (a) (1), (3) and (5) of the Act. More specifically, the complaint alleges the Respondent discharged Elei Florence and C. Edward Force on March 4, 1974 because of their membership and activities on behalf of the Union in violation of Section 8 (a) (1) and (3) of the Act. Further, the complaint alleges that in violation of Section 8 (a) (5) and (1) of the Act, the Respondents, on March 4, 1974, without prior notice unilaterally abrogated or cancelled an oral collective bargaining agreement with the Union. Respondent has denied the commission of any unfair labor practices. Pursuant to notice a hearing was held before me on February 19 and 20, 1975, at Omaha, Nebraska.

Upon the entire record,[2] including my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Charging Party and the Respondent, I make the following:

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[2] As requested by the General Counsel in his brief, his unopposed motion to correct the transcript as follows is granted: Page 139 Line 8 from "local" to "Global". Page 224, Lines 16-17 from "corporate industries" to "corporations".

I. Jurisdiction

Jurisdiction in this case depends on whether or not the entities named, Global Industries, American Theatre and Downtown Books, constitute a single employer within the meaning of the Act. For if Global Industries is not to be included, the Board's standards for asserting jurisdiction have not been met. The findings concerning the operations of the corporate entities named herein are based upon stipulations, exhibits, and, to some extent, upon the vague and generalized testimony of Richard Berry, the manager of the Pussycat Theatre and the bookshop. No other witnesses testified concerning the operations or the relationship of the companies toward each other.

Global Industries, Inc. is a Georgia corporation maintaining offices in Atlanta, Georgia, where it is engaged in the business of investing in and owning corporations. During all times material herein, it wholly owned various corporations engaged in the business of operating adult movie theatres and adult book stores located in various states, including Alaska, Florida, Georgia, Illinois, Indiana, Louisiana, Nebraska, North Carolina, Oklahoma and Texas. Included among the wholly owned entities are Johnny Rebb's Book Store in Atlanta, Georgia, American Theatre and Downtown Books in Omaha, Nebraska, and Panama Books in Florida. Global Industries annually received dividend revenues in excess of $50,000 from its subsidiary corporations located outside the State of Georgia. Its gross receipts for the tax year ending November 30, 1973 amounted to $1,408,059.60. It annually purchases goods and materials valued in excess of $50,000 from suppliers located outside the State of Georgia. American Theatre Corporation, incorporated in Nebraska and doing business as Pussycat Theatre, owns and operates a theatre by the same name in Omaha, Nebraska where it shows adult movies to the restricted public. Its gross receipts for the tax year ending November 30, 1973 amounted to $112,552.75. It

annually purchases goods and materials valued in excess of $10,000 from sources outside the State of Nebraska for use at its Omaha, Nebraska location. Downtown Books, Inc., also a Nebraska corporation, is engaged in the retail sale and/or rental of books and magazines and the sale of various novelty items to the public. Its place of business is located in the lobby of the Pussycat Theatre in Omaha. Downtown Books' gross receipts for the like period amounted to $172,319.21.

American Theatre and Downtown Books opened for business in early February 1971 in downtown Omaha in a building, remodeled as a theatre. Sometime in December 1970, according to Berry's account, while he was employed as manager for Johnny Rebb's Book Store in Atlanta,[3] Robert Mitchum told him of the theatre and book store to be opened in Omaha and hired him to manage the operation – the theatre and the book shop.[4] Joint Exhibit 1, representing copies of annual registrations filed with Georgia's Secretary of State, shows that Mel Friedman was president of Global Industries from 1970-74; Joint Exhibit 4, copy of a Nebraska occupation tax report filed in August 1974, shows the same Mel Friedman as president of American Theatre; Joint Exhibit 5, a like Nebraska report filed in August 1974, shows Friedman as secretary of Downtown Books and Ralph Mitchum who hired Berry for Panama Books, is shown to be president of Downtown Books. Robert Mitchum is shown on Joint Exhibit 2, a copy of the annual registration filed with the Georgia

[3] As noted above, this business was also wholly owned by Global Industries.

[4] At the time of the hearing, Berry was then employed in a supervisory capacity with Panama Books, Inc. in Jacksonville, Florida, another wholly owned corporation of Global Industries. He was hired by Ralph Mitchum, Robert's brother, to work at Panama Books.

Secretary of State, to have been secretary treasurer of Union Industries, Inc. during the period of 1970-1973 and Mel Friedman appears as president during the period 1970-1974. Downtown Books has been wholly owned by Union Industries which, in turn, has been wholly owned by Global Industries. American Theatre obtains its film from Global Leasing Company. Joint Exhibit 3 shows it is located at the same address in Atlanta as Global Industries. It also shows Friedman listed as its president in 1973. Berry has been neither an officer nor a director of any of the entities involved. He has been the top operating official situated in Omaha. The corporate offices for all the entities are located in the same building in Atlanta. The building is owned by Global Industries. The subsidiaries use a common accounting service located in Atlanta. Berry testified he sent time sheets to the "accounting office" in Atlanta and pay checks would be sent from Atlanta. The checks were signed by Mel Friedman. Berry also sent the personnel forms to Atlanta.[5] Bills for debts incurred by Berry for American Theatre or Downtown Books would be sent by Berry to Atlanta from where the bills were paid. Before Berry could make a sizeable purchase, e.g., the purchase of a projector, he would have to clear it with Julius Davenport.[6] Berry testified he was not told the specific wage rates he could pay employees but he was instructed by Davenport at the time he assumed the managerial position in Omaha, to pay a reasonable rate – and to consider the rates paid in the

[5] Employment applications, payroll information and other related personnel information.

[6] Davenport does not appear on any of the exhibits to have been an officer of any of the entities. However, based on the record testimony, it appears he was "enmeshed" as an operating official of Global Industries. Thus, he is located in the same Atlanta office. As Berry testified, Davenport was also associated with Johnny Rebb's. Berry would discuss problems with either Davenport or Friedman.

area. However, the credited testimony of Earl Wise, the Union's president, described more fully below, shows that in 1972 when he sought to get an increase in pay and vacation benefits for the projectionists, Berry responded he did not have the authority and "that he would have to contact the people in Atlanta, Georgia."

The jurisdictional issue would be more readily susceptible to resolution had there been testimony from the corporate officials located in Atlanta. However, based upon the record as made, it appears to the undersigned the evidence nevertheless is sufficient to support a finding that Global Industries, together with its wholly owned subsidiaries, constitute a single integrated enterprise and, as such, is a single employer for purposes of asserting jurisdiction. As stipulated by the parties, Global Industries is in the business of investing and owning corporations engaged in the same type of business – operating adult movie theatres and book shops. These enterprises are scattered throughout a number of states in the United States and each is set up as a separate corporation. It appears, as in the case of the Omaha operations, when Global Industries decided in 1970 to open the theatre and book shop, the two corporations, American Theatre and Downtown Books, were formed. While Berry was hired to manage the day-to-day operations of the theatre and the book shop, the overall direction of the Omaha operation emanated from the same source – Global Industries in Atlanta. From this record, it appears that the wholly owned subsidiaries were themselves mere shells, the corporate forms being largely paper realities that do not reflect the business realities. The Respondent's counsel argues in his brief that the formulation of labor policies of American Theatre started and ended with Berry. The evidence as described above does not support this contention. Berry did run the daily operations but evidence discloses major decisions were controlled by the officials in Atlanta. Berry received instructions, albeit general, to restrict wages to that paid in

the Omaha area. And, in 1972, faced with a demand for a wage increase and vacation benefits, he said he did not have such authority and would have to discuss it with the management in Atlanta. But be that as it may, Berry may be likened to that of a general manager of a facility for absentee owners. And the owner in this case was Global Industries. The transparency of the corporate veil becomes apparent when we look upon the manner in which Berry's transfers were effected. Berry in 1970 was manager of Johnny Rebb's Book Store in Atlanta, a wholly owned subsidiary of Global Industries. At that time he was hired by Robert Mitchum to manage a theatre and book shop to be opened in Omaha, Nebraska. The exhibits do not show who the officers were of American Theatre and Downtown Books in 1970 – but at that time Robert Mitchum was secretary of Union Industries which was wholly owned by Global Industries. Downtown Books in turn became wholly owned by Union Industries. And when Berry shifted from the Omaha operation in the latter part of 1974 to Panama Books in Jacksonville, Florida as a supervisor, that change was made by Ralph Mitchum. Panama Books was a wholly owned subsidiary of Global Industries. Ralph Mitchum in 1974 was president of Downtown Books. It should also be noted that Davenport, although not specifically identified as an officer or director of any of the entities, was described as being associated with Johnny Rebb's and also was one of the individuals, together with Mel Friedman, from whom Berry received his orders while manager of the Omaha operations. The figure of Mel Friedman of course appears in all the entities herein involved as an officer during this entire relevant period.

Accordingly, on the facts presented, I find and conclude, contrary to the Respondent's position, that Global Industries, Inc., American Theatre Corporation, d/b/a Pussycat Theatre and Downtown Books, Inc. are a single

employer engaged in a single integrated enterprise and that it will effectuate the purposes of the Act to assert jurisdiction.[7]

II. The Labor Organization Involved

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2 (5) of the Act.

III. The Alleged Unfair Labor Practices

The General Counsel contends a bargaining relationship was established between the Respondent and the Union in January 1971 and an oral collective bargaining agreement, although limited in scope, was reached at that time covering the projectionists at the Pussycat Theatre. The Respondent's conduct in discharging the two projectionists – Elei Florence and Edward Force on March 4, 1974, forms the basis for the General Counsel's unfair labor practice allegations. The General Counsel contends the Respondent discharged the two individuals because of their support for the Union and because of Respondent's determination to repudiate the collective bargaining relationship with the Union in violation of Section 8(a)(1) and (3) of the Act. The General Counsel further contends that when the Respondent discharged the two projectionists and thereafter hired others at a lower rate the Respondent unilaterally abrogated and/or unilaterally repudiated the agreement reached in 1970 thereby effecting the changes in the terms and conditions of employment of the employees. The Respondent admits the appropriateness of the bargaining unit consisting of the projectionists at the Pussycat Theatre. The Respondent argues that no collective bargaining relationship ever existed – that the only agreement entered

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[7] *Midwest News Reel Theatres, Inc.* 151 NLRB 857; *Cedar Hills Theatres, Inc., et al,* 168 NLRB 871.

into consisted of an oral agreement for the Union to refer projectionists for one year commencing on January 8, 1971. He says further that even this limited agreement did not extend beyond the one year period. Thus, runs his argument, there was no unilateral cancellation of any existing collective bargaining agreement in 1974. The Respondent advances two reasons for the discharge of Florence and Force – incompetency and the desire to cut costs by hiring others at a lower rate of pay than that paid to the alleged discriminatees.

Berry came to Omaha in December 1970 to assist in the remodeling of the building to house the theatre and the book shop. The operation opened to the public in early February 1971. On December 14, 1970, Earl Wise the Union's president and Floyd Gibson, Business Representative for the Union, introduced themselves to Berry and said they wanted to negotiate a contract for projectionists when the theatre opened. Berry said he would contact the Union at a later date. On January 8, 1971, the Union representatives met again with Berry. Berry said he intended to run the film for 16 hours a day. Wise informed Berry the Omaha area wage rate was $5 an hour. Berry said he couldn't and wouldn't pay that rate. When Wise then countered with $4.50 an hour, Berry agreed. Wise then proposed a two week vacation for projectionists after one year's service and a written contract but Berry rejected both proposals. Berry agreed Union representatives would have visitation rights to inspect the projection room. Berry said the film would run from 9:30 a.m. to 1:00 a.m. the following morning. The Union said it would furnish projectionists for a one year period. Following this January 8 meeting the Union thereafter furnished the projectionists as needed. On October 14, 1972, Wise accompanied by two other Union representatives, went to see Berry and requested a wage increase to $5 an hour and a two week vacation which Berry had rejected in January 1971. Berry responded he did not have the request but he would "contact the people in

Atlanta, Georgia" and would respond to the Union at a later date. On November 14, 1972, the parties met again. This meeting had been called by Berry who then asked Wise if he had any objection to the projectionists submitting to a lie detecor test. Wise offered no objection provided the employees were willing.[8] Wise asked Berry if he had heard from Atlanta regarding the Union's proposals for a wage increase from $4.50 to $5 and the two week vacation benefit. Berry replied he couldn't agree to either proposal.[9] Despite Berry's rejection of the Union's proposals the Union continued to furnish projectionists when needed at $4.50 an hour. All projectionists hired were sent by the Union.[10]

During the entire relevant period, two full time projectionists were used at the theatre, one on each shift at $4.50 an hour, as agreed upon between the Union and the Respondent. Edward Force was one of the two original projectionists hired. He was introduced to Berry by Gibson and began working at $4.50 an hour when the theatre first opened in February 1971. He voluntarily quit in August 1972. In January 1973 he received a call from Gibson and then returned to work for the Respondent. During his periods of employment with Respondent, he maintained a full time job elsewhere. Force had been working in the industry under a Union permit since 1961. Elei Florence, a Union member, was referred by Gibson and began his

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[8] No explanation was offered for the lie detector test.

[9] The events recited above are based upon the credited testimony of Earl Wise. Berry's testimony throughout was replete with vagaries, generalities, inconsistencies, and, in most instances, he did not recall even the substance of conversations.

[10] At various times during the period 1971 until the March 4 discharges, the Union had referred about 6 projectionists, including the two alleged discriminatees.

employment with Respondent as a projectionist at $4.50 an hour in June 1971. On March 4, 1974, Berry telephoned Florence at home between 7:30 and 8:00 a.m. Florence was scheduled to report for work at 9:30 a.m. Berry said there was no need for him to report any more – "he would be just going non-union personnel." When Florence went to the theatre later to pick up his personal effects, he asked Berry why he was going non-union. Berry responded he wasn't mad at anyone – he had to cut expenses. Immediately after Berry notified Florence of his discharge, Florence called Gibson and told him what had occurred. At about 9:30 that morning, Berry telephoned Wise whose credit testimony is reported below:

> He told me that he had discharged the men and I asked him why. He said that he just no longer needed the union down there. I said, "Well, certainly we could come down and discuss it with you." He relayed to me that he could get projectionists at $2 or $2.50 an hour, and that he had to cut down an overhead and he just refused to talk to us.
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> * * * * *
>
> I told Mr. Berry that if we – it would be a point to talk about, and he told me that he knew we would not work for that kind of money.

Force was at work at his other place of employment on March 4, when the news of his termination was relayed to him by the Union. That evening he went to the theatre to collect his personal things. Berry was there but they did not engage in any conversation. Florence and Force were replaced with two other individuals Berry hired at $3 and $3.50 an hour.

Berry testified he decided to discharge Florence and Force for two reasons – because he had to cut costs and because the two individuals were not performing to his satisfaction. He stated he had received a call from either Davenport or Friedman that he should reduce his costs at the theatre. He decided he could hire projectionists at a lower wage scale than that being paid to Florence and Force. As stated, above, Berry's testimony was replete with vagaries and onconsistencies. From his confused testimony, it is impossible to determine whether he had hired or even talked to replacements before discharging Florence and Force on Monday, March 4, 1974. At one point in his testimony, he stated he decided on Sunday, March 3, to discharge them. Yet elsewhere in his testimony he testified he lined up the replacements the previous Friday or Saturday. And still elsewhere he testified he didn't recall if he talked to anyone before he decided to discharge the two discriminatees. At one point he testified the replacements started working on March 4 and yet elsewhere when asked if he had anyone to replace Florence and Force on March, he stated, "Someone possibly to take their place." He was unable to recall with certainty that he called anyone prior to March 4 and speculated he may have operated the projectors himself on both shifts until replacements were put on. With respect to Respondent's reliance on the failure of Florence and Force to perform their jobs properly, Berry explained that they failed to keep the projectors clean. He added that he also found Force asleep or reading a book in the projection booth a number of times, with a blank screen, attributable to Force's failure to switch projectors. Berry testified he *constantly* asked them to keep the projectors clean and to keep them oiled. But he told this to all the projectionists over the three year period.[11] And,

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[11] At least four other projectionists had been employed at the theatre at one time or another during this three year period.

according to Berry, over this entire three year period, the projectors were never kept cleaned or oiled. He testified he found Force asleep or reading a book with a blank screen because Force neglected to switch the projectors. It will be recalled Force worked for the Respondent during two periods – from February 1971 to August 1972 and from January 1973 to March 4, 1974. Berry said he found Force asleep or reading a book several times – he guessed at anywhere from two to ten times. This occurred several times during Force's initial period of employment and also when he returned. He was unable to recall when the last such incident occurred but stated he spoke to Force on each occasion. Force, in his testimony admitted that on two occasions Berry came into the booth when he had fallen asleep and on two occasions he had been reading when he had failed to switch the projectors. According to Force's credited testimony, he read a book frequently while on duty and Berry never said anything about it. According to Force, on the occasions the screen was blank, Berry only came in and told him of the blank screen but did not refer to his being asleep or reading a book. The first time Berry came in while he was asleep or reading with a blank screen was during his first period of employment. The last occasion was in about May 1973. Both Florence and Force credibly testified they cleaned the projectors routinely and Berry at no time directed them to clean the machines nor did Berry complain the machines were dirty.

To prop up its defense relating to the alleged failure of the discriminatees to maintain the projectors properly, the Respondent called Delbert Sayles as a witness. Sayles was a projectionist in another theatre and also repaired projectors as a sideline. He testified he first received a call from Berry on a Sunday. Berry asked him to repair the projectors and said he had experienced breakdowns with the machines several times. Sayles said he took one projector at a time and loaned Berry a spare. The first one he had for two to three weeks before he returned it to Berry and then he

took the second one. Sayles testified he found each of the machines dirty and bone dry of oil. He was unable to state the date when Berry first called him to repair the machines. He also testified that about this same time Berry also inquired if he knew of any projectionists who wanted to work at the theatre. Sayles referred his son and, according to Sayles, his son began working for Pussycat several days later. Although somewhat fuzzy in the record, this much is clear. Sayles' son began working for the Pussycat after Florence and Force were discharged and it wasn't until *after* Sayles' son began working there that Sayles reported to Berry what was wrong with the machines.

Concluded Findings

I find, in agreement with the General Counsel, that a collective bargaining relationship was established in 1971 whereby the Union became the bargaining representative for the projectionists employed at the Pussycat Theatre. An agreement was reached whereby the Union would refer projectionists and the wage scale would be $4.50 an hour. The parties further agreed the Union would have visitation rights to inspect the projection booth to insure proper working conditions were maintained. This represented the entire agreement between the parties, the Respondent having rejected other Union proposals and refusing to agree to a written contract. Although the agreement reached did not encompass the wide range of terms and conditions of employment normally to be found in a written contract between a union and an employer, there nonetheless existed an agreement establishing specific terms of employment. Although the agreement was oral, rather than written, this does not change the nature of the agreement reached. I reject the Respondent's argument that since the Union agreed in January 1971 to furnish projectionists for one year, any agreement reached expired one year thereafter. For it is clear that the parties intended to continue the agreement thereafter indefinitely and the Respondent

continued to recognize the Union as the collective bargaining representative for the projectionists. Thus in November 1972 Berry requested approval from the Union to have the employees submit to a lie detector test. The Union continued to furnish projectionists beyond the one year period. And also in 1972, the parties discussed additional benefits for the employees – a wage increase and vacation benefits. The Respondent did not agree to the Union's proposals and the oral agreement remained in effect thereafter. In March 1974, in disregard to the agreed upon terms and conditions of employment, albeit orally, the Respondent unilaterally reduced the wage rates of the unit employees and discharged the employees then employed in the unit. Although it may be said the oral agreement was open-ended with no definite expiration term, it does not follow that the Respondent was free to pursue a change in the agreed upon terms or conditions of employment which had endured for more than three years without first discussing this contemplated change with the Union and seeking agreement through the collective bargaining process. There was no attempt here to discuss the matter with the Union. Rather, Berry refused to discuss the change in the wage rate with Wise. He, in effect, announced he was no longer recognizing the Union because it suddenly was too costly to deal with the Union. There was no showing that the Respondent was so financially distressed, if at all, as to require such immediate action without taking the time to first notify and consult with the Union regarding the existing wage scale. This was a matter which the Respondent was statutorily obligated to bargain with the Union in advance and not as a fait accompi. And this is so regardless of whether the Respondent was governed solely by economic reasons where, as in the present case, the circumstances did not excuse such unilateral action. Such conduct constitutes a complete rejection of the collective bargaining process and a circumvention of the duty to negotiate which frustrates the objectives of the obligations arising under Section 8(a)(5) of the Act.

The Respondent contends that one of the reasons for the discharge of Florence and Force was because of their incompetence. This alleged incompetence embraced their failure to properly maintain and clean the projectors and, in the case of Force, his tendency to fall asleep or read a book, resulting in the projector running through an entire reel having the screen with no projected image. I find Berry's testimony in support of these reasons unworthy of belief. The credited testimony shows that Berry never directed the projectionists to clean the machines nor did he complain to them that the machines were dirty. I find incredible of belief Berry's testimony he gave such directions and complained constantly to all the projectionists about the maintenance of the machines and his assertions that the machines were never cleaned or oiled over the entire three year period. Nor can I place any reliance upon Sayles' testimony to support the Respondent's defense. For it is clear, according to Sayles' testimony, that Berry told him there had been breakdowns with the projectors several times and was unaware of the reasons for the malfunction. It was *after* the discriminatees had been discharged that Berry was first informed the projectors were not oiled. And as to Respondent's contention concerning Force's inattention to the operation of the projector, the credited testimony shows this occurred twice during Force's first period of employment with the Respondent. Yet he was reemployed. Twice more it occurred when Force returned to work. The last such incident occurred in May 1963, almost a year before his discharge. In sum, I am persuaded that the above reasons advanced by Respondent for discharging Florence and Force were pretextual in nature and seized upon as afterthoughts in a vain attempt to create a legitimate justification for its action in terminating their employment.

I have no doubt that the Respondent was interested in reducing the overhead of the operation. But, as Berry stated, this was a concern to him during the entire period he was manager. There has been many a case over the years

where an employer, in an effort to reduce costs, runs afoul of its statutory obligations under the Act by unlawfully refusing to bargain with the collective bargaining representative of its employees or by unlawfully discharging supporters of a union. The pattern of Berry's conduct discloses not only an intent to reduce costs but also a design to shed the Respondent of a bargaining relationship with the Union of three years standing which he felt required him to retain employees at a wage scale which he intended to lower. Aware that Florence and Force were members of the Union[12] Berry terminated them because of their Union affiliation leaving him an open field to hire replacements at a lower rate. Berry told both Wise and Florence in substance he would no longer recognize the Union. Interestingly, Berry discharged Florence and Force without even inquiring of them whether they would continue their employment at a reduced hourly rate. Accordingly, I find that Respondent's discharge of Florence and Force on March 4, 1974 violated Section 8(a)(1) and (3) of the Act.

Conclusions of Law

1. Respondent (Global Industries, Inc., American Theatre Corp. d/b/a Pussycat Theatre and Downtown Books, Inc.,) is, and all times material hereto has been, an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. All motion picture projectionists employed by American Theatre Corp. d/b/a Pussycat Theatre, Omaha,

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[12] Although Force held only a permit from the Union, this is only a distinction without a difference in the circumstances of this case.

Nebraska, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. At all times material herein, the Union has been the exclusive bargaining representative of the employees in the aforesaid unit within the meaning of Section 9 (a) of the Act.

5. By unilaterally reducing the wages of the employees in the aforesaid unit and by refusing to afford continued recognition to the Union on March 4, 1974, the Respondent has thereby refused to bargain collectively with the Union and has engaged in unfair labor practices in violation of Section 8 (a) (5) and (1) of the Act.

6. By terminating Elei Florence and Edward Force because of their membership and support of the Union, the Respondent has thereby discouraged membership in a labor organization and engaged in unfair practices within the meaning of Section 8 (a) (3) and (1) of the Act.

7. The foregoing unfair labor practices affect commerce within the meaning of Section 2 (6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Since the Respondent, in derogation of its statutory obligations, withdrew recognition from the Union, unilaterally reduced the wage rates of its employees without

first bargaining with the Union. and deeming it appropriate that the employees be reinstated to their employment status they enjoyed prior to the Respondent's unilateral action, I shall recommend that the Respondent be ordered to recognize the Union's representative status and to rescind the unilateral change in the wage rates and to restore retroactively the wage rate in effect prior to such unilateral action.

As the Respondnet unlawfully discharged Elei Florence and Edward Force, I shall recommend that Respondent be ordered to offer them full and immediate reinstatement, without prejudice to their seniority or other rights and privileges and to reimburse them for any loss of pay they may have suffered. Back pay shall be computed on a quarterly basis, plus interest at 6 percent per annum, as prescribed in *F.W. Woolworth Company*, 90 NLRB 289 and *Isis Plumbing & Heating Co.*, 138 NLRB 716 from the date of discharge to the date reinstatement is offered.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10 (c) of the Act, I hereby issue the following recommended.[13]

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[13] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, Global Industries, Inc., American Theatre Corp. d/b/a Pussycat Theatre and Downtown Books, Inc., their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain with International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local No. 343, AFL-CIO, as the exclusive representative of the employees in the unit described below, concerning rates of pay, wages, hours of employment, and other conditions of employment:

> All motion picture projectionists employed by American Theatre Corp. d/b/a Pussycat Theatre, of Omaha, Nebraska, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

(b) Making changes in wages, rates of pay and other terms and conditions of employment of its employees in the above-described unit during the term of its agreement with the Union without its consent or thereafter without first consulting with and bargaining with the Union concerning such contemplated changes.

(c) Discouraging membership in the Union, or any other labor organization, by discriminatorily discharging its employees or by discriminating in any other manner with respect to their hire or tenure of employment or any term or condition of employment.

(d) In any other manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them in the Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Bargain in good faith, upon request, with the Union as the exclusive representative of the employees in the aforesaid appropriate unit, concerning wages, hours, and other terms or conditions of employment, and embody in a signed agreement any understanding reached.

(b) Revoke the unilateral changes made to the wage rates existing immediately prior to March 4, 1974.

(c) Offer Elei Florence and Edward Force immediate and full reinstatement to their former positions or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and make them whole for any loss of earnings they may have suffered in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and reports, and all other records necessary to analyze and compute the amount of backpay due under the terms of this Order.

(e) Post at its place of business in Omaha, Nebraska, copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by

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[14] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

the Regional Director for Region 17, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 17, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.

Dated at Washington, D.C. May 13, 1975.

/s/ Bernard Ness

Administrative Law Judge

APPENDIX C

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29 United States Code, §158 (a) provides in pertinent part:

(a) It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.
